Supreme Court, U.S.
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No. 85-1171

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

JAMES B. BRISTOW,

Petitioner,

v.

THE DAILY PRESS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT THE DAILY PRESS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS BELOW CORRECTLY APPLIED THE UNANIMOUS REQUIREMENT AMONG THE FEDERAL CIRCUITS THAT IN EACH CONSTRUCTIVE DISCHARGE CASE A PLAINTIFF MUST PROVE THE EXISTENCE OF WORKING CONDITIONS SO INTOLERABLE THAT A REASONABLE PERSON, SIMILARLY SITUATED, WOULD HAVE RESIGNED.

II. WHETHER THE "CLEARLY ERRONEOUS" STANDARD OF FED. R. CIV. P. 52(a), WHICH APPLIES ONLY TO "ACTIONS TRIED UPON FACTS WITHOUT A JURY," SHOULD HAVE BEEN APPLIED BY THE COURT OF APPEALS IN REVIEWING THE JURY'S VERDICT IN THIS CASE.

III. WHETHER THIS COURT SHOULD REVIEW AN ISSUE WHICH WAS NEVER RAISED IN THE DISTRICT COURT AND WAS NEVER RAISED IN THE COURT OF APPEALS.

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COUNTERSTATEMENT OF THE CASE

Respondent, The Daily Press, Inc. (Daily Press), does not rely upon the Statement of the Case contained in the Petition for Certiorari and submits the following counterstatement.

A. PROCEDURAL HISTORY

Petitioner James B. Bristow brought the above-captioned action under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.S. Sections 621-634, (ADEA), alleging two causes of action. He first alleged that the Daily Press had discriminated against

him in failing to promote him to certain higher level positions for which he had allegedly applied and for which he was allegedly qualified. Petitioner's second cause of action alleged that his request for early retirement, while appearing voluntary, was actually a forced resignation and, therefore, claimed that he was constructively discharged from Daily Press' employ due to the allegedly intolerable working conditions deliberately imposed upon him by his employer.

Petitioner's claims against Daily Press were tried before a jury in the U.S. District Court for the Eastern District of Virginia, Newport News Division, beginning April 4, 1984. The jury rendered a verdict in favor of the Daily Press on the first cause of action. The jury found in favor of Petitioner on the constructive discharge claim and awarded $99,000 in general damages and $50,000 in liquidated damages.

Following the entry of judgment, counsel for the parties timely filed post trial motions and appropriate oppositions thereto. The Daily Press moved the Court to enter judgment n.o.v. or, alternatively, for a remittitur and/or a new trial.

In its Memorandum Opinion dated August 2, 1984, the Court directed the Clerk to enter judgment in favor of Bristow and against the Daily Press for counsel fees in the sum of $8,825.00 and costs in the sum of $1,500. Additionally, in said Memorandum Opinion, the Court denied Daily Press' Motion for Judgment N.O.V. Alternatively. Motion for Remittitur and/or a New Trial.

The principal argument advanced by Daily Press in its Motion for Judgment N.O.V. focused upon whether the facts, as developed at trial, met the criteria for constructive discharge under applicable law. Various other substantive issues involving damages and jury instructions were also raised. Petitioner did not raise any procedural objections to

the Motion for Judgment N.O.V. and did not allege any deficiencies in Respondent's two motions for directed verdict.[1]

The parties filed timely cross-appeals in the Fourth Circuit. Again the primary arguments centered upon the issues of constructive discharge, excessive damages, and attorneys fees. Again Petitioner failed to raise procedural issues involving Respondent's Motion for Judgment N.O.V., and again, did not allege that the motions for directed verdict were insufficient.

In its opinion dated August 22, 1984, the Fourth Circuit reversed the judgment in favor of Bristow holding that, even construing the evidence in the light most favorable to the Petitioner, the constructive discharge test was not met. Petitioner was granted an enlargement of time to Petition for Rehearing en banc. Said Petition was denied on October 29, 1985.

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[1] The Petitioner made the following argument in its Opposition to the Respondent's Motion for Judgment N.O.V.:

> "C. *Judgment Notwithstanding the Verdict:*
>
> A Judgment notwithstanding the verdict is not unlike a motion for a directed verdict. In deciding whether to grant judgment n.o.v., the trial court must consider all evidence and inferences in the light most favorable to the non-moving party. In other words, if the jury could reasonably draw the inferences necessary to the non-moving party's case, or if the moving and non-moving parties's inferences are equally likely, then a judgment n.o.v. would not be entered. *Moore v. Carolina Power & Light Co.*, 537 F.2d 1252 (4th Cir. 1976). [*cert. denied*, 429 U.S. 1001 (1977)]
>
> Considering all of the evidence and inferences in the light most favorable to plaintiff, it simply cannot be said that the jury's verdict was erroneous."

Plaintiff's Opposition to Motion for Judgment N.O.V. at 21.

B. STATEMENT OF FACTS

Respondent, The Daily Press, Inc., is a closely-held corporation which publishes morning and afternoon newspapers of daily circulation. The newspapers published are *The Daily Press* and *The Times Herald*, respectively. These newspapers are circulated throughout the Virginia peninsula.

Respondent hired Petitioner, James B. Bristow, in February 1965. Petitioner performed a variety of functions, all within the circulation department during his fifteen years as an employee of Respondent's newspapers. On October 15, 1980, Daniel Cruey, then assistant circulation director, promoted Petitioner to manager of circulation District 25. Petitioner's duties were identical to other district managers. He supervised newspaper circulation, collections and billing for a number of homes and businesses to which the newspaper was delivered. Each circulation district comprised a group of subscribers within a particular geographic area. District 25 encompassed one of the larger geographic areas and included an economic cross-section of newspaper subscribers. There were fifty-seven carriers in the district including fifty-five home delivery boys and two motor routes. (TR. 85). Supervising Bristow at that time were division manager Jean Burdick, his immediate supervisor; Daniel Cruey, assistant circulation director; and John Goodwyn, circulation director. Bristow resigned as District 25 manager in September of 1981.

Prior to his appointment as District 25 manager, Petitioner worked as a "swing man" who substituted for other district managers throughout the newspapers' circulation districts as needed. He began his duties in July 1979 after the appointment of the new single copy sales manager, Jim Casey. Petitioner determined he would rather be "swing

man" district manager rather than Mr. Casey's assistant.[2] Petitioner remained in the "swing man" district manager position for a period of fifteen months until his appointment as District 25 manager in October of 1980.

Upon assuming his duties as District 25 manager, Petitioner encountered the usual problems associated with management of circulation districts. In particular, collection problems in the two low-income areas and increased gasoline prices for two motor carrier routes caused carrier turnover. (TR 91). Additionally, younger carriers occasionally failed to update circulation lists causing small circulation overruns and attendant collection problems. (TR 93, 94) Petitioner testified at trial that he was able to stabilize these problems within three or four weeks of his arrival at circulation District 25. (TR 90). Moreover, both Petitioner's predecessor, H. Nelson Salway, (TR 170) and successor, Robert H. Gray, (TR 191) experienced similar problems with District 25 and concluded they were not unique to that district; other districts they had managed presented similar problems.[3]

Approximately ten months after his assignment to District 25, Petitioner was routinely audited and blamed for several outstanding accounts. Petitioner and all other district managers personally paid collection shortfalls caused

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[2] Petitioner now asserts it was 1980 when circulation director Goodwyn "led him to believe (that either assistant circulation director or single copy sales manager) would be his." (Petition p. 6). In fact, Bristow testified at trial that his conversations with Goodwyn concerning these jobs occurred in July 1979. (TR 60, 61, 63). Moreover, Respondent employed assistant circulation director Cruey in August of 1979. (TR 259). Goodwyn informed Petitioner of this fact over the July 4, 1979 holiday weekend. (TR 61).

[3] Petitioner implies District 25 was unmanageable since his predecessor, Salway, suffered a nervous breakdown. (Petition p. 8). Salway chose to return to District 25 rather than manage another district in October 1979 (TR 171). Gray encountered only minor problems when he succeeded Petitioner (TR 187).

by circulation overruns within their districts to the extent that carriers did not pay for newspapers delivered to them. Despite this company-wide employment policy, Bristow did not believe he was responsible for the shortfall discovered during the audit. Throughout his employment, Petitioner experienced problems in accounting for sums he collected on behalf of The Daily Press. In part, this was due to his practice of commingling these sums with his own funds. (TR 161). His unsatisfactory accounting procedures were known to his supervisors at The Daily Press (TR 239, 259), and on numerous occasions he was required to pay deficiencies with his own funds. (TR 263-64).

On September 9, 1981, Petitioner was called to a meeting with Goodwyn, Cruey, and Burdick and presented with a list of uncollected accounts totalling $562.34. Although Petitioner's job performance was reviewed comprehensively and criticized in some respects, his supervisors did not threaten to fire him. Despite the work-rule requiring reimbursement for uncollected sums by district managers, Cruey suggested that Petitioner pay only one-half of the total sum. Nonetheless, Bristow remained convinced that he wasn't obligated to pay the sum but finally tendered it after a request from Burdick. No further action was taken against Bristow after the meeting. In fact, a September 9 summary memorandum written by circulation head Goodwyn soundly criticized division manager Burdick rather than Bristow for the problems in District 25. (TR 240).

Despite having heard nothing further from either Goodwyn or Cruey since the meeting, Petitioner voluntarily resigned several days later after concluding that management wanted him out. Petitioner personally delivered his resignation to Respondent's president, William Van Buren, Jr. Mr. Van Buren informed Petitioner that his request was "short notice," but he would attempt to honor it. (TR 111,

318). Van Buren then expedited the request and polled the Board of Directors by telephone who voted to accept the resignation. (TR 317-18). After this action, Petitioner changed his mind and requested he be allowed to withdraw his resignation. By that time Petitioner was no longer employed with the Company and the pension manager had been so notified. Respondent chose not to rehire Petitioner.

C. THE PARTIES

James B. Bristow, Petitioner.

The Daily Press, Inc. is a closely-held corporation which owns and operates two newspapers circulated throughout the Virginia peninsula including the cities of Newport News, Hampton, Norfolk and Williamsburg. In addition, the company owns two cable distribution network subsidiaries, Piedmont Cablevision Company and Newport News Cablevision Company. Finally, the corporation has an ownership interest in the Aberdeen Company which owns a shopping mall in Hampton, Virginia.

REASONS FOR DENYING THE WRIT
SUMMARY OF ARGUMENT

The Federal Circuits all require that plaintiff must establish working conditions which a reasonable person would find intolerable in order to recover for constructive discharge. There is no conflict whatsoever on this point. The Fourth Circuit unequivocally found that the plaintiff totally failed to establish intolerable working conditions. It is clear that petitioner has failed to establish a conflict among the circuits with respect to the critical central issue in this case.

Petitioner additionally argues that the Fourth Circuit and others require an additional showing of subjective intent on the part of an employer to impose intolerable working conditions in a constructive discharge case. Petitioner's

assertion is not only irrelevant to the disposition of this case, it is inaccurate. Petitioner's alleged conflict among the Federal Circuits is primarily a semantic difference.

There is no authority whatever for Petitioner's assertion that the standard of review embodied in Rule 52(a) applies to a case tried to a jury.

Finally, this court should not review an issue raised for the first time in a Petition for certiorari.

I. THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD RECOGNIZED BY ALL FEDERAL CIRCUITS IN FINDING THAT PLAINTIFF FAILED TO PROVE INTOLERABLE WORKING CONDITIONS WHICH WOULD CAUSE A REASONABLE PERSON TO RESIGN.

The Federal Circuits uniformly require a plaintiff who would prove constructive discharge to demonstrate that a "reasonable person" in the plaintiff's shoes would have been compelled to resign as a result of intolerable working conditions. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984); *Penna v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983); *Lojek v. Thomas*, 716 F.2d 675, 681 (9th Cir. 1983); *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982); *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981); *Clark v. Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981); *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *Alicia Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

The Fourth Circuit applied this universally accepted standard and concluded that petitioner had failed to prove the principle element of his case:

> At most Bristow demonstrated that he experienced problems in managing District 25, which may have been somewhat greater than those of other managers due to the comparatively large size of his territory. No reasonable person would have found his job intolerable.

Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

Petitioner suggests that an apparent conflict in the Circuits on the requisite elements of constructive discharge warrants this Court's review of the Court of Appeals' decision in this case. Plaintiff's assertion of this premise badly misses the mark since consideration of the question of constructive discharge solely from the perspective of a reasonable employee would not alter the result in this case.

The Court of Appeals clearly held that Petitioner failed to establish *either* element of constructive discharge. Plaintiff failed to establish intolerable conditions as required by all Circuits. Plaintiff also failed to prove the secondary issue of subjective intent.

The objective reasonable person standard of proof of intolerable working conditions is an essential element in each case of constructive discharge. The law will not permit a finding of constructive discharge based upon the subjective perceptions of a particular employee since this would subject employers to liability for discrimination based upon the whim of unusually sensitive employees. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).

As the Fourth Circuit noted in this case:

> The employment discrimination laws require as an absolute precondition to suit that some adverse employment action has occurred. They cannot be

> transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quiting.

Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

Absent disparate treatment of a protected employee class, where an employer treats each employee substantially the same through the consistent application of standard work rules, there is no basis for a claim of discrimination. *Neal v. Dillon*, 534 F. Supp. 1381, 1390 (E.D.N.Y. 1982), *aff'd.* 714 F.2d 116 (2d Cir. 1983). An employee is not entitled to claim constructive discharge because he resigns over the application of a particular work rule. Yet the record unequivocally demonstrates Petitioner resigned for precisely this reason. He was dissatisfied over Respondent's requirement that district managers personally reimburse the company for circulation overruns caused by their carriers' failure to monitor their circulation lists properly, or to collect sufficient sums from their subscribers. Plaintiff introduced not a scintilla of evidence which demonstrated disparate treatment from that of any other district manager. In fact, Respondent levied a lessor penalty on Petitioner by requiring him to reimburse the paper for only one-half of the uncollectible circulation debts within his district. (TR 110).

Petitioner's attempts to characterize his employment conditions as unusual, discriminatory or intolerable, are unpersuasive. District 25, although larger geographically than some other districts, was managed satisfactorily by two other district managers before and after Petitioner resigned. (TR 170, 191). One presumably construed the district a challenge which could lead to job advancement. (TR 171). Moreover, Petitioner's attempt now to manufacture a conspiracy of denied promotions in which Respondent "sought to build Bristow up and then let him down" is without any

support in the record. (Petition p. 14). Respondent's denial of Petitioner's supposed applications for promotion to single copy sales manager and assistant circulation director was uncorroborated at trial; the jury found his representations to this effect unpersuasive. Moreover, any alleged conversations were concluded, according to Petitioner, over fourteen months prior to his appointment as District 25 manager and over two years prior to his resignation.[4]

In addition, Petitioner's other allegations of discrimination are unsupported. There is no evidence that Petitioner's transfer to District 25 was abrupt given his length of duty as swing man. No connection exists between the absence of a carrier audit eleven months prior to his resignation and the $532.34 collection shortfall over which he resigned.

The decisions of the Federal Circuits which have reviewed constructive discharge cases on appeal do not reflect a "schism" as to what actions of an employer will give rise to a constructive discharge. Rather, they reflect the variations manifested by the unique work histories which the appellate courts were called upon to review. Petitioner argues that there is a conflict among the Circuits with respect to the requirement of an additional showing of "subjective intent" on the part of the employer to impose intolerable conditions. Petitioner's assertion is not only irrelevent to the disposition of this petition, it is also inaccurate.[5]

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[4] Any residual embarrassment he may have felt is of no consequence, for "[t]hat occurs any time an employee is not promoted." *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds*, ____ U.S. ____, 104 S.Ct. 2794 (1984).

[5] The Court below considered the secondary issue of employer intent only in passing and devoted only two sentences to the issue in its five page opinion. *Bristow*, 770 F.2d at 1251. The Court, as with other opinions in other Federal circuits, focused instead upon the primary requirement that Petitioner failed to demonstrate intolerable working conditions which would

Petitioner states that the requirement of "subjective intent" is improper and that a finding regarding the objective reasonable person standard should be all that is required. This ignores the unequivocal language of the Court below that subjective "[i]ntent may be inferred through circumstantial evidence." *Bristow*, 770 F.2d at 1255, *citing, Holsey v. Armor & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1395 (1985). Thus, it is clear that the Fourth Circuit permits proof of *subjective* intent through an *objective* showing of "circumstantial evidence," including the severity of the working conditions and the failure of an employer to correct untenable working conditions. See *Holsey*, 743 F.2d at 209.

It is apparent that the conflict which Petitioner seeks to have resolved is little more than a semantic distinction without a difference. Where subjective intent may be proven by "circumstantial evidence" of working conditions and failure to correct those conditions, the plaintiff's burden of proof is virtually identical.

II. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW.

A. The "Clearly Erroneous" Standard of Rule 52(a) Does Not Apply to a Case Tried to a Jury.

Petitioner incorrectly asserts that the Circuit Court should have applied the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). The prescription of Rule 52(a) that findings of a District Judge may be put aside if "clearly erroneous" applies only to cases actually *tried* to a District

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lead a reasonable person, similarly situated, to resign. See *Penna v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). ("The Retreat's treatment of Mrs. Penna cannot even remotely be described as intolerable.").

Judge and is totally inapplicable in jury cases. The rule on its face, and as applied by the Courts makes this clear.

Rule 52(a) unambiguously states that it applies to "all actions *tried upon facts without a jury* . . . ." (Emphasis added). This Rule has no applicability to a case tried to a jury.

In *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir. 1961), the Eighth Circuit held:

> In any event, we are satisfied that Rule 52 applies only to findings of fact in actions tried to a court without a jury, and possibly to situations where the jury is serving only in an advisory capacity.

Id. at 618.

There is no authority whatever for the proposition that Rule 52(a) applies to a general verdict by a jury. Accordingly there is no basis for review by this Court.

B. The Court of Appeals Applied the Correct Standard of Review in Construing the Evidence in the Light Most Favorable to the Plaintiff.

The Court of Appeals correctly applied the standard of review of a jury verdict on denial of a motion for judgment n.o.v. in a Federal District Court:

> Even construing the evidence in the light most favorable to the nonmoving party, as we are required to do in reviewing a jury verdict on a motion for judgment n.o.v., *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980), the constructive discharge test was not satisfied here. For judgment n.o.v. to be denied, there had to exist "substantial evidence" upon which a jury could reasonably return a verdict for Bristow.

> *Wyatt*, 623 F.2d at 891. We are convinced that such evidence is lacking.

770 F.2d at 1255.

Every circuit which has considered the issue has applied the same standard of review set forth by the Court below. It is clear that where plaintiff receives a jury verdict in his favor and the court denies defendant's motion for judgment notwithstanding the verdict, the appellate court must apply the same standard as the trial court, that is, the appellate court must view the evidence "in the light most favorable to the plaintiff." *Kademenos v. Equitable Life Assurance Soc.*, 513 F.2d 1073 (3rd Cir. 1975); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 423 U.S. 913 (1976); *Sandoval v. U.S. Smelting, Refining & Mining Co.*, 544 F.2d 463 (10th Cir. 1976); *Houser v. Sears Roebuck & Co.*, 627 F.2d 756 (5th Cir. 1980).

The Fourth Circuit applied the correct standard of review in this case. Petitioner's claim that the "clearly erroneous" standard of Rule 52(a) should have been applied is utterly without merit.

III. THE PLAINTIFF NEVER RASIED THE ISSUE OF ALLEGED DEFICIENCIES IN DEFENDANT'S MOTIONS FOR DIRECTED VERDICT IN THE DISTRICT COURT, OR IN THE FOURTH CIRCUIT, AND CANNOT RAISE THE ISSUE HERE FOR THE FIRST TIME.

Petitioner argues for the first time that Defendant did not properly move for a directed verdict on the issue of constructive discharge based on age discrimination.[6] Peti-

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[6] While Petitioner designates this issue as one of three Questions Presented for Review (Petition p. ii), the only mention of the issue appears in a footnote (Petition p. 28).

tioner failed to raise this issue in his Opposition to Respondent's Motion for Judgment N.O.V., (see p. 3, *supra*) and failed to raise the issue on appeal to the Fourth Circuit. Petitioner is clearly barred from raising the issue for the first time in a Petition for Certiorari.

This Court has held that it will not review an issue which was not raised in District Court. *Blum v. Stenson*, ____ U.S. ____, 79 L.Ed.2d 891, 897, n.5 (1984).

This Court has similarly held that it will not review an issue which was not raised before the Circuit Court. *County of Oneida v. Oneida Indian Nation*, ____ U.S. ____, 84 L.Ed.2d 169, 185 (1985).

Because the Petitioner failed to raise this issue in *either* of the courts below, this Court should decline to consider the issue.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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